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No. 89-1699

In The

Supreme Court of the United States

October Term, 1989

ROBERT D. HAMM and WILLIAM H. WILLIAMS,

Petitioners,

vs.

DENNIS NORRED and BRUCE JOHNSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

For their Statement of the Case, Respondents will adopt the statement of the facts as set forth in the original panel decision of the Eleventh Circuit as found at 874 F.2d, pages 767 and 768:

> In the evening of October 26, 1982, Marlon Wiggins entered the Santa Rosa County Sheriff's office and informed Sgt. Paul Pridgen that he had information concerning a drug deal to occur later that night. Wiggins said that Bob Hamm and a man named "Hub", later identified as William H. Williams, would be involved. Although Sgt. Pridgen believed that Wiggins was slightly intoxicated and might not be fully reliable, he called Bruce Johnson, a narcotics officer with the sheriff's office, who in turn contacted Dennis Norred, Chief Deputy of the office.
>
> Upon Norred's arrival at the sheriff's office, Wiggins related that recently he had given the sheriff's department in adjacent Okaloosa County information regarding drug deals. Although Norred's police report read that Johnson did not have time to verify Wiggins' reliability by checking with the Okaloosa County Sheriff's office, both Johnson and an officer from Okaloosa County testified that the Okaloosa officer reported to Johnson on the telephone that Wiggins was reliable because more than a dozen drug dealers had been arrested based on information obtained through Wiggins.
>
> Wiggins told Norred that he had met with Hamm earlier that day and had requested Hamm to supply him with "some stuff" to sell. Hamm had held up a bag (which Hamm later testified contained a six-pack of beer and two packs of chewing tobacco) and replied that he

had "some stuff right here." In response to Wiggins' inquiry regarding where Hamm was going to be that evening, Hamm told him that he was going to go to the nearby Elco Truck Stop. After placing a listening device on Wiggins, Norred and Johnson, in an unmarked police car, followed Wiggins' vehicle to the truck stop.

Wiggins met Hamm in the truck stop's parking lot while "Hub" Williams remained in Hamm's Land Rover vehicle. In a conversation heard by appellants through the listening device, Wiggins asked whether Hamm had the "stuff", and Hamm responded by asking whether Wiggins brought money. Hamm would not allow Wiggins to see the "stuff" unless Wiggins showed him money. Then, Wiggins became angry, and Hamm left to take Williams home. When Wiggins asked Hamm where he was going, Hamm replied that he was "going down the road". Wiggins said that he would follow Hamm.

At Williams' request, Hamm turned off the road into the parking lot of Faulk's or Fortune's Store, about a mile from the truck stop. Hamm left his vehicle for a moment, told Wiggins that he would meet with him in a short while after he took Williams home, returned to his vehicle, and began to drive out of the parking lot. Norred and Johnson believed that the conversations that they had overhead confirmed Wiggins' tip that a drug deal would occur. They had followed Hamm's and Wiggins' vehicles, and at a time when all three vehicles were at the Fortune Store's parking lot, Wiggins told the officers through the transmitter that Hamm and Williams possessed "the dope" and guns.

As Hamm drove towards the exit of the parking lot, Norred, believing Hamm was trying

to flee, tried to block the exit. The vehicles collided and a chase ensued. Appellees testified that they never saw a flashing blue light on the other car and did not know their pursuers were policemen. Hamm testified that he told Williams that "[I've] undoubtedly convinced this joker [Wiggins] . . . that I've got something" and that the pursuers might be associates of Wiggins trying to take away "the stuff". At one point when the vehicles were entangled, Johnson observed a flash from the Land Rover and shouted "muzzle flash" to Norred. Once the vehicles came to a momentary stop off the road, Norred jumped from his car and shouted, "Halt, police." As the Land Rover started again and passed the officers, they fired their guns at the vehicle. Hamm was struck by a bullet in his side, and Williams received a cut on his head. Norred and Johnson continued to pursue the Land Rover until it stopped a short distance away. Hamm was arrested at the scene. Williams ran into the woods and was arrested later at his house.

No weapon was found on Hamm or Williams. A .22 caliber revolver in the glove compartment had not been fired. No drugs, except for marijuana residue in a canvas pouch, were found. Williams was detained in jail for two days and was released. Hamm was later tried on criminal charges and acquitted.

SUMMARY OF ARGUMENT

The decision of the Eleventh Circuit Court of Appeals does not conflict with any opinions of this Court or any other Circuit Court of Appeal. The Petition for Writ of Certiorari should be denied.

ARGUMENT

QUESTION I

SHOULD A FOURTH AMENDMENT "REASONABLENESS" TEST BE DECIDED BY A JURY WHEN THERE ARE CONFLICTING FACTS IN AN EXCESSIVE FORCE CLAIM AND THE DEFENDANT HAS CLAIMED QUALIFIED IMMUNITY?

The answer to that question, as phrased, is ordinarily yes because juries customarily decide factual questions. When the evidence is insufficient to go to a jury as to factual questions, however, a directed verdict is appropriate by the court.

In the Eleventh Circuit's original panel opinion in the case at bar, *Hamm v. Powell*, 874 F.2d 766, the court held as follows on that question:

> In attempting to make an arrest for which they had probable cause, appellants, in 1982, reasonably could have believed that engaging in a vehicular collision and firing shots did not violate clearly established statutory or constitutional rights. Thus, we affirm the district court's grant of directed verdict in favor of appellants on qualified immunity grounds regarding appellees' excessive force claim based on the Fourth Amendment.
>
> In denying appellants' motion for directed verdict on appellees' excessive force claim based on the Fifth and Fourteenth Amendments, the district court incorrectly stated that qualified immunity does not apply to substantive due process claims. *See Clark v. Evans*, 840 F.2d 876 (11th Cir. 1988); *Acoff v. Abston*, 762 F.2d 1543 (11th Cir. 1985). Qualified immunity applies to

> the excessive force claim based on substantive due process as well as to the claim based on the Fourth Amendment. Therefore, we reverse the district court's denial of appellants' motion for directed verdict regarding the claim based on substantive due process.

874 F.2d at 771.

Petitioners then filed a Petition for Rehearing and Suggestion for Rehearing En Banc and while that Petition was pending the Eleventh Circuit had the opportunity to study this Court's decision in *Graham v. Connor*, 490 U.S. ___, 104 L.Ed.2d 443, 109 S.Ct. ___ (1989). Having studied this Court's opinion in *Graham v. Connor*, supra, the Eleventh Circuit granted rehearing and in its opinion on rehearing made it clear that the court was well aware of this Court's pronouncements in *Graham v. Connor*. The Petition on Rehearing discusses it as follows:

> Since the original arguments in this case, the Supreme Court has decided *Graham v. Connor*, ___ U.S.___, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1985), a case which has a major impact upon the issues, and our analysis of, this case.
>
> Under *Graham*, the Supreme Court made clear that in arrest cases of this sort, courts must analyze claims of wrongful arrest *and* force "under the Fourth Amendment's 'objective reasonableness' standard." *Graham*, 109 S.Ct. at 1867. Thus, *Graham* has made our discussion in *Hamm* of substantive due process under the Fifth and Fourteenth Amendments unnecessary.

893 F.2d at 294.

Accordingly, the Eleventh Circuit on rehearing held:

> We now hold that the force the defendants used to effect the arrest was reasonable under the Fourth Amendment.

893 F.2d at 294.

This Court, in *Graham v. Connor*, after having determined that the appropriate analysis was one of objective reasonableness under the Fourth Amendment, concludes its opinion as follows:

> Because the Court of Appeals reviewed the District Court's ruling on the motion for directed verdict under an erroneous view of the governing substantive law, its judgment must be vacated and the case remanded *to that court* for reconsideration of that issue under the proper Fourth Amendment standard.

104 L.Ed.2d at 457 (Emphasis supplied).

In the case at bar the Eleventh Circuit did exactly what this Court directed the Fourth Circuit to do in *Graham v. Connor*, that is, analyze the evidence in the context of objective reasonableness under the Fourth Amendment. There is therefore no need to disturb the opinion of the Eleventh Circuit in the case at bar on that ground. The Eleventh Circuit has already analyzed the evidence under the objective reasonableness standard of the Fourth Amendment as promulgated by this Court in *Graham v. Connor*, supra.

QUESTION II

WHEN DEPUTY SHERIFFS ARE SUED INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES, DOES A DEFENSE OF QUALIFIED IMMUNITY NULLIFY A JUDGMENT AGAINST THE DEPUTIES IN THEIR OFFICIAL CAPACITY?

The answer to Question II, as phrased by Petitioner, is clearly no. Petitioner correctly cites, on page 26 of the Petition for Certiorari, the controlling decisions to the effect that good faith immunity is not available to a state official in his official capacity.

One unfortunately imprecise statement was made by the Eleventh Circuit in its opinion on rehearing. That statement is:

> We have held, and do hold, that qualified immunity protects the defendants in this matter. That is all the immunity they need.

893 F.2d at 294.

That statement can be interpreted to apply qualified immunity to the defendants in their official capacities. However, the actual holding of the court on rehearing is found in the next paragraph of the opinion in which the court states:

> We now hold that the force the defendants used to effect the arrest was reasonable under the Fourth Amendment.

893 F.2d at 294.

If the court's opinion on rehearing be interpreted to apply a qualified immunity defense of good faith to Defendants in their official capacities, then it is in error.

Nonetheless, the original panel decision of the Eleventh Circuit was correct when the court held:

> Appellants were sued both in their official and personal capacities. Appellants correctly point out that they are protected in their official capacities because Florida has not waived its Eleventh Amendment immunity for actions under section 1983.

874 F.2d at 770.

In their official capacities, Respondents are immune from liability under Section 1983 pursuant to the Eleventh Amendment to the United States Constitution, as the original panel decision held.

Eleventh Amendment immunity is, of course, generally decided by reference to state law. *Harden v. Adams*, 760 F.2d 1158 (11th Cir. 1985).

Florida's waiver of sovereign immunity, Florida Statutes § 768.28 makes it clear that it is not intended to waive any immunity the state enjoyed or that its agencies and subdivisions enjoyed under the Eleventh Amendment to the Constitution. This is provided in subsection (16) of the Statute, which reads as follows:

> (16) No provision of this section, or of any other section of the Florida Statutes, whether read separately or in conjunction with any other provision, shall be construed to waive the immunity of the state of any of its agencies from suit in federal court, *as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States*, unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court. This subsection shall not be

> construed to mean that the state has at any time previously waived, by implication, its immunity, or that of any of its agencies, from suit in federal court through any statute in existence prior to June 24, 1984.

768.28(16) (Emphasis supplied).

The Supreme Court of Florida has recently decided the cases of *Spooner v. Department of Corrections*, 514 So.2d 1077 (Fla. 1987) and *Hill v. Department of Corrections*, 513 So.2d 129 (Fla. 1987), holding squarely that the State of Florida has not waived its Eleventh Amendment Immunity for itself or its agencies and subdivisions or its officers in their official capacities.

The Eleventh Circuit has twice held that Alabama Sheriffs are state officers for purposes of Eleventh Amendment Immunity. *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989); *Free v. Granger*, 887 F.2d 1552 (11th Cir. 1989). The Alabama laws governing Alabama Sheriffs are remarkably parallel to the Florida laws governing Florida Sheriffs. The Alabama Constitution provides that a Sheriff shall be elected from each county and may be impeached. Ala. Const. Am. 35. The Florida Constitution and Statutes provide for election of a sheriff from each county and removal by the Governor. Fla. Const. Art. VIII, § 1(d), Art. IV § 7(a); Fla. Stat. § 30.09, § 116.09, § 950.08. The county has absolutely no control over the sheriff in this regard. *See McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987); *Harden v. Adams*, 760 F.2d 1158 (11th Cir. 1985) (degree of state control over entity is factor in determining whether entity is entitled to Eleventh Amendment immunity). Both Alabama and Florida Sheriffs are required to give bond. Ala. Stat. § 36-22-1; Fla.

Stat. § 30.01-02. The bond of Florida Sheriffs is payable to the Governor. Fla. Stat. § 30.01-02.

All fees, etc., collected by Alabama and Florida Sheriffs are paid into the County fund. Ala. Stat. § 36-22-17; Fla. Stat. § 30.51. And both Alabama and Florida Sheriffs are paid from the county treasury. Ala. Stat. § 36-22-16; Fla. Stat. § 30.48, 30.50. The only significant difference between Alabama and Florida Sheriffs is that the Alabama Constitution refers to Sheriffs as executive officers of the state. Ala. Const. Art V, § 112, whereas the Florida Constitution includes sheriffs in the list of county officers. Fla. Const. Art. VIII, § 1(d). The difference in labels applied by the respective states should not be the determining factor where the officers from each state are in so many respects alike.

Similarly, in *Gulledge v. Smart*, 691 F.Supp. 947 (D.S.C. 1988), *affirmed*, 878 F.2d 379 (4th Cir. 1989), the district court analyzed the status of South Carolina sheriffs and concluded those sheriffs were entitled to Eleventh Amendment immunity. In that case the court considered significant the legislative enactments setting forth the duties and compensation of the sheriff, the sheriff's arrest powers, the sheriff's territorial jurisdiction and the power to remove the sheriff. *Id.* at 941. The *Gulledge* court, *Id.* at 955, also relied upon prior decisions of the South Carolina Supreme Court recognizing the relationship between the sheriff and his deputies, the absolute control over the selection and retention of deputies that is vested in the sheriff, and the absence of county control in that regard. Florida law is identical. *See* Fla. Stat. § 30.07; *Murphy v. Mack*, 358 So.2d 822 (Fla. 1978); *Tanner v. McCall*, 625 F.2d

1183 (5th Cir. 1980); *Sikes v. Boone*, 562 F.Supp. 74 (N.D. Fla. 1983).

Applying this analysis to Florida law, the Florida Constitution establishes the elective office. Fla. Const. Art. VIII, § 1(d). The Legislature prescribed the duties and compensation of the sheriff and has set forth a statutory scheme in this regard. Fla. Stat. § 30.01 et. seq. Included within Florida law are statutory mandates including the place of office, Fla. Stat. § 30.10, the place of residence, Fla. Stat. § 30.11, the powers, duties and obligations of the sheriff, Fla. Stat. § 30.15, sheriff's fees, Fla. Stat. § 30.231, and related matters.

Additionally, although the sheriff's budget is initially set and funded by the Board of County Commissioners, the decision of the county may be overridden by the State Administration Commission and Executive Office of the Governor and Cabinet. Fla. Stat. § 30.49. Furthermore, Fla. Stat. § 30.53 guarantees the independence of constitutional officers such as the sheriff. Fla. Stat. § 30.53.

Finally, although the sheriff, as an elected official, is not subject to hiring and firing by the state, the removal of a sheriff for misconduct is provided for in the Florida Constitution and Statutes. Fla. Const. Art. IV, § 7, Fla. Stat. § 30.09, § 116.09, § 950.08. The county has absolutely no control over the sheriff in this regard.

Two Florida courts, in a landmark decision, have held that sheriffs are agencies of the state. In *Murphy v. Mack*, 341 So.2d 1008 (Fla. 1st DCA 1977), the court was faced with a question brought by the Fraternal Order of Police contending that sheriffs were public employers and deputies public employees within the meaning of

Florida's Public Employees Relations Commission. The First District Court of Appeal ruled as follows:

> Obviously the sheriff is not the state, a county, a municipality, a special district or a subdivision thereof, and respondent does not assert that he is. *Respondent argues that the sheriff is an agency of the state,* and therefore comes within the definition of a public employer. *We agree.*

341 So.2d at 1009 (Emphasis supplied).

> An "office" is an agency of the state. The sheriff holds the office of sheriff. It follows that *the sheriff is an agency of the state,* and thus comes within the definition of "public employer".

341 So.2d at 1009 (Emphasis supplied).

The Florida Supreme Court affirmed the First District as to its holding that sheriffs are agencies of the state in *Murphy v. Mack,* 358 So.2d 822 (Fla. 1978), when the court opined that:

> In response to the first question, we agree with the decision and rationale of the District Court and find that the definition of public employer does encompass sheriffs.

358 So.2d at 824.

CONCLUSION

The Eleventh Circuit Court of Appeals correctly applied the Fourth Amendment reasonableness test as mandated by this Court's decision in *Graham v. Connor,* supra. Any questions of immunity are therefore moot. If the question of immunity must be decided, then the panel

decision of the Eleventh Circuit was correct in holding that Florida sheriffs and their deputies in their official capacities are protected by the immunities afforded them under the Eleventh Amendment to the United States Constitution. The Petition for Certiorari should be denied.

Respectfully submitted,

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